Supreme Court, U.S.
FILED
99 416 SEP 09 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

---

ERIC RURAL HANNA,
Petitioner,

v.

MICHIGAN,
Respondent.

On Petition for a Writ of *Certiorari*
to the Michigan Supreme Court

---

# PETITION FOR A WRIT OF CERTIORARI

---

Kary L. Moss
(Counsel of Record)
Michael J. Steinberg
American Civil Liberties Union
Fund of Michigan
1249 Washington Blvd., Ste. 2910
Detroit, Michigan 48226-1822
(313) 961-7728

David Rudovsky
924 Cherry Street, Ste. 500
Philadelphia, PA 19107
(212) 925-4400

Attorneys for Petitioner

49 pp

## QUESTION PRESENTED FOR REVIEW

In executing a search warrant for a blood sample from a drunk driving suspect, is it reasonable within the meaning of the Fourth Amendment for police officers to inflict increasing levels of pain with "pain compliance" devices until the suspect gives up his health-based refusal to cooperate with the blood draw?

## TABLE OF CONTENTS

**QUESTION PRESENTED FOR REVIEW** ..... i

**TABLE OF AUTHORITIES** ..... iii

**REFERENCE TO OPINIONS AND ORDERS BELOW** ..... 1

**STATEMENT OF JURISDICTION** ..... 1

**CONSTITUTIONAL PROVISION** ..... 1

**STATEMENT OF THE CASE** ..... 2

**ARGUMENT** ..... 4

**The Fourth Amendment Reasonableness Clause Does Not Permit the Police to Use Pain-Inflicting Devices to Coerce a Drunk Driving Arrestee Into Giving Up His Objection to a Blood Draw** ..... 4

**A.** *It is Objectively Unreasonable for the Police to Use Force or Inflict Pain to Overcome a Suspected Drunk Driver's Objection to a Blood Draw.* ..... 5

**B.** *It is Objectively Unreasonable for the Police to Use Pain-Inflicting Devices or Torture Techniques to Force a Person to Comply With a Fourth Amendment Seizure.* ..... 8

**CONCLUSION** ..... 13

**APPENDIX**

## TABLE OF AUTHORITIES

Page

Cases

*Forrester v. San Diego*, 25 F.3d 804 (9th Cir. 1994) . 12, 13

*Graham v. Connor*, 490 U.S. 386 (1989) ..... 3, 6, 8

*Harper v. Harris County*, 21 F.3d 597 (5th Cir. 1994) ... 12

*Hudson v. McMillian*, 503 U.S. 1 (1992) ..... 12

*Nelson v. Irvine*, 143 F.3d 1196 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 444 (1998) ..... 5, 8, 9

*People v. Hanna*, ___ N.W.2d ___, 459 Mich. 998 (1999) ..... 1, 4, 6, 11, 12

*People v. Hanna*, 567 N.W.2d 12 (Mich. Ct. App. 1997) ..... 1, 3, 7, 10, 11

*People v. Hanna*, 587 N.W.2d 637 (Mich. 1998) ..... 1, 4

*People v. Walters*, 407 N.W.2d 662 (Mich. Ct. App. 1987) ..... 9

*Rochin v. California*, 342 U.S. 165 (1952) ..... 12

*Schmerber v. California*, 384 U.S. 757 (1966) ..... passim

*South Dakota v. Neville*, 459 U.S. 553 (1983) ..... 4, 5

*Tennessee v. Garner*, 471 U.S. 1 (1985) ..... 6

*Winston v. Lee*, 470 U.S. 753 (1985) ..... 11

Statutes

28 U.S.C. § 1257 ..... 1

MICH. COMP. LAWS § 257.625a(2) (1979) ..... 2

Constitution

U.S. Const. amend. IV ..... 1

## REFERENCE TO OPINIONS AND ORDERS BELOW

The May 16, 1997, Michigan Court of Appeals' opinion and dissent are published as *People v. Hanna,* 567 N.W.2d 12 (Mich. Ct. App. 1997). The June 30, 1998, Michigan Supreme Court order denying leave to appeal is published as *People v. Hanna,* 587 N.W.2d 637 (Mich. 1998). The June 8, 1999, Michigan Supreme Court's opinion on reconsideration and dissents are published as *People v. Hanna,* ___ N.W.2d ___, 459 Mich. 998 (1999).

All of these published decisions are all reproduced in the appendix to this petition.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the Michigan Supreme Court's June 8, 1999, opinion on reconsideration. *People v. Hanna,* ___ N.W.2d ___, 459 Mich. 998 (1999). The Michigan Supreme Court's opinion on reconsideration upheld, by a vote of four to three, the May 16, 1997, majority opinion of the Michigan Court of Appeals affirming Petitioner's conviction, *People v. Hanna,* 567 N.W.2d 12 (Mich. Ct. App. 1997).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION

***U.S. Const. amend. IV***

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

The facts in this case are undisputed. On New Year's Eve 1993, police officers in Sault Ste. Marie, Michigan, pulled over the Petitioner for speeding. During the stop, the officers concluded that Petitioner had been drinking. The officers accordingly administered field sobriety tests, which Petitioner failed, and a "preliminary breath test," which reflected a 0.169 blood alcohol level.[1] The officers then arrested Petitioner and requested that he take another breath test. After Petitioner refused to take another breath test, the officers obtained a search warrant to draw a sample of Petitioner's blood and transported him to a hospital for that purpose.

At the hospital, Petitioner expressed fear of contracting AIDS from the needle and refused to cooperate with the officers and the hospital technician. The technician informed the officers that he could not draw the blood safely if Petitioner resisted.

The officers responded by applying "Do-Rite sticks" to Petitioner's wrists. As one of the officers later testified, Do-Rite sticks consist of two plastic rods attached by a short cord that can be gradually tightened around the wrist so that pain will radiate up the detainee's arm. The devices are not used as restraints but "are designed to gain compliance" and are released once the detainee complies with the officer's orders. The officer testified that "[I]t's not a permanent pain. It's just real quick and simple. It is used for compliance for subjects that aren't cooperative."

The officers tightened the Do-Rite sticks around Petitioner's wrists until he agreed to remain still during the

---

[1] The results of a "preliminary breath test" are sufficient to justify an arrest but are not generally admissible at trial. MICH. COMP. LAWS § 257.625a(2) (1979).

blood draw. Petitioner testified that the tightening of the Do-Rite sticks around his wrists was "very, very painful" and made his wrists sore for two weeks. Petitioner also confirmed that the pain "shoots up the arm into your shoulders."

After Petitioner agreed to cooperate, the officers removed the Do-Rite sticks and the hospital technician drew a sample of Petitioner's blood. The blood test results, which were incriminating, were admitted into evidence at Petitioner's trial. The jury convicted Petitioner of operating a motor vehicle while intoxicated.

Petitioner then moved for a new trial, arguing that the blood test results should have been suppressed because the police violated his constitutional rights by deliberately inflicting pain upon him in order to execute the search warrant. The trial court denied the motion, holding that the police acted reasonably under the circumstances.[2]

On appeal, the Michigan Court of Appeals issued a published opinion affirming Petitioner's conviction by a vote of two to one. *People v. Hanna*, 567 N.W.2d 12 (Mich. Ct. App. 1997). The majority concluded that the officers acted reasonably within the meaning of the Fourth Amendment in using pain to force Petitioner to give up his opposition to the blood draw. *Id.* at 14-16.

The dissent wrote that it was "both shocking and unreasonable that defendant was forced into compliance through the use of pain-inflicting devices." *Id.* at 19. The dissent would have distinguished "between the use of *force*

---

[2] At the motion hearing, counsel and the trial court analyzed the officers' behavior under the Cruel and Unusual Punishment Clause of the Eighth Amendment. On appeal, the Michigan Court of Appeals recognized that after *Graham v. Connor*, 490 U.S. 386 (1989), the conduct was properly analyzed under the Fourth Amendment.

(possibly causing incidental pain) and the *direct infliction of pain* to coerce a person to act a certain way" because "the latter is, at least generally, constitutionally proscribed." *Id.* (emphasis in original). The dissent observed that this Court has twice stated that a compelled blood test may be unconstitutional if the police used inappropriate force. *Id.* at 18 (citing *Schmerber v. California*, 384 U.S. 757, 760 n. 4 (1966) and *South Dakota v. Neville*, 459 U.S. 553, 559 n. 9 (1983)).

After the Michigan Court of Appeals' decision, Petitioner filed an application for leave to appeal in the Michigan Supreme Court. On June 30, 1998, the Michigan Supreme Court denied the application without comment by a vote of four to three. *People v. Hanna*, 587 N.W.2d 637 (Mich. 1998).

After Petitioner moved for reconsideration, the Michigan Supreme Court issued an opinion on reconsideration and again denied leave to appeal by a vote of four to three. *People v. Hanna*, ___ N.W.2d ___, 459 Mich. 998 (1999). The majority concluded that "the officers used a reasonable amount of force in light of the surrounding facts and circumstances," particularly since "the officers used the Do-Rite sticks for only a few seconds and defendant was not injured." *Id.*, 459 Mich. at 998.

Justice Cavanagh issued a short dissent in which he complained that "the majority is allowing pain coercion/bodily violence to collect evidence." *Id.* at 999. Justice Kelly issued a lengthy dissent, in which she wrote "the use of this pain-inflicting device to obtain compliance in furnishing evidence for a prosecution violated the defendant's right to be free from unreasonable searches and seizures." *Id.* at 1000.

Petitioner now requests that this Court grant this petition for a writ of certiorari.

## ARGUMENT

### The Fourth Amendment Reasonableness Clause Does Not Permit the Police to Use Pain-Inflicting Devices to Coerce a Drunk Driving Arrestee Into Giving Up His Objection to a Blood Draw.

This case presents two important open questions concerning the Fourth Amendment Reasonableness Clause. The narrower question, which this Court explicitly left open in both *Schmerber v. California*, 384 U.S. 757, 760 n. 4, 771 (1966), and *South Dakota v. Neville*, 459 U.S. 553, 559 n. 9 (1983), is whether it is reasonable for the police to inflict pain in order to obtain blood from a drunk driving arrestee who objects, for religious or health reasons, to the blood draw procedure. The Michigan Supreme Court and the Michigan Court of Appeals each held that it was reasonable for the police to apply pain-inflicting devices to Petitioner, who feared that he would contract AIDS from the needle, until he gave up his refusal to cooperate. By contrast, the Ninth Circuit recently held that the police may not use force or coercion to obtain blood from a drunk driving suspect if the State has other methods of proving intoxication. *Nelson v. Irvine*, 143 F.3d 1196 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 444 (1998).

The broader question is when, if ever, may the police intentionally inflict pain to force a person to comply with an otherwise lawful Fourth Amendment seizure. The dissenters in both the Michigan Court of Appeals and the Michigan Supreme Court argued that there is a constitutional line between pain inflicted as a necessary incident to constitutional Fourth Amendment activity and pain deliberately inflicted to coerce a person into complying with the police. Petitioner submits that the latter type of pain is simply torture and that its use on an

unarmed arrestee "violates fundamental values that separate this society from less enlightened systems of governance." *People v. Hanna*, ___ N.W.2d ___, 459 Mich. 998, 1002 (Kelly J., dissenting).

Since both the narrower and the broader questions involve the claim that the police used excessive force while executing a warrant, both questions turn on the "objective reasonableness" of the officers' actions. *Graham v. Connor*, 490 U.S. 386, 388, 392-395 (1989). As this Court observed in *Graham*, "the reasonableness of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Id.* at 395 (citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985) (emphasis in original)).

### A. *It is Objectively Unreasonable for the Police to Use Force or Inflict Pain to Overcome a Suspected Drunk Driver's Objection to a Blood Draw.*

It is undisputed that the police may compel a suspected drunk driver to submit to a blood-alcohol test. *Neville*, 459 U.S. at 459. In both *Neville* and *Schmerber*, however, this Court recognized that a compelled blood test may be unreasonable if the police resort to violence or inflict pain in order to obtain the blood sample.

In *Schmerber*, this Court upheld the administration of a blood test to a drunk driving suspect, but observed "It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force." *Id.*, 384 U.S. at 760 n. 4. In *Neville*, this Court again recognized that a constitutional question would be presented if the police used "inappropriate force" to overcome a drunk driving suspect's resistance to a blood draw. 459 U.S. at 559 n. 9.

This Court's decision in *Schmerber* hinged on the fact that Schmerber did not pose a sincere objection to the blood

draw and that no significant pain was involved:

> *[F]or most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused. We need not decide whether such wishes would have to be respected.*
>
> Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment--for example, it were administered by police in the privacy of the stationhouse. *To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.*

*Schmerber* at 771-772 (emphasis supplied; footnote and internal citation omitted).

It is undisputed that Petitioner refused to cooperate with the blood draw because he feared he would contract AIDS from the needle. *Hanna*, 567 N.W.2d at 19. Therefore, Petitioner, unlike Mr. Schmerber, is "one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing." This case therefore squarely presents

the question that this Court left open in *Schmerber*: "whether such wishes would have to be respected," *Id.*

Instead of respecting Petitioner's wishes, the police responded by tightening "Do-Rite sticks" around his wrists and deliberately inflicting pain until Petitioner gave up his refusal. This case is, therefore, the "different case" of which this Court spoke in *Schmerber*, where the "police initiated the violence" and "responded to resistance with inappropriate force." 384 U.S. at 760 n. 4. Restated in terms of *Graham*, the issue is whether it is "objectively reasonable" to inflict pain upon such a person in order to force him into cooperating with the blood draw.

In stark contrast to the Michigan Supreme Court's majority opinion, the Ninth Circuit recently held that it is unreasonable to use force or coercion to obtain a blood sample from a suspected drunk driver if the State may prove intoxication by other means. *Nelson*, 143 F.3d at 1200-1204, 1207. The *Nelson* court specifically relied on the language from *Schmerber* quoted above to conclude that the police may not inflict pain or use force to extract blood from a suspected drunk driver unless there is no other way of establishing intoxication. *Id.*

The police in Petitioner's case had other ways to attempt to prove intoxication without inflicting excruciating pain upon him until he complied with a blood draw that he believed would give him a terminal illness. The police never offered Petitioner an alternative chemical test after he refused to cooperate with the blood draw.[3] Even if Petitioner had declined all chemical

---

[3] Petitioner had declined to take a second breath test at the scene of the traffic stop a few minutes after his "preliminary breath test." The police did not offer Petitioner a breath test or a urine test after he refused to

(continued...)

testing, the jury would have been informed of that refusal and the police still could have testified to Petitioner's intoxication based on his driving, his appearance and odor, and his performance on the field sobriety tests. See *People v. Walters*, 407 N.W.2d 662 (Mich. Ct. App. 1987) (prosecution need not introduce chemical evidence in order to convict defendant of driving while intoxicated). Even the trial court, in denying the motion for new trial, observed that it was unnecessary to draw Petitioner's blood. Therefore, it was patently unreasonable for the police to inflict increasingly severe pain upon Petitioner until he gave up his objection to the blood draw.

Petitioner respectfully submits that this Court should grant this writ of certiorari in order to answer the issue left open in *Schmerber* and *Neville* and to resolve the conflict between *Nelson* and the Michigan Supreme Court's decision in this case.

**B.** *It is Objectively Unreasonable for the Police to Use Pain-Inflicting Devices or Torture Techniques to Force a Person to Comply With a Fourth Amendment Seizure.*

The use of the Do-Rite sticks on Petitioner was patently unreasonable in a broader sense. There is no dispute from the record that the "Do-Rite" sticks were used solely to coerce Petitioner into ending his refusal to cooperate. As Officer LaCross explained:

> A: They are designed to gain compliance. Once compliance is gained the pressure is supposed to be relieved in order to not cause any injury or long term pain.
>
> * * * *

---

[3](...continued)
cooperate with the blood draw.

Q: You say there was control on the amount of pressure?

A: I applied it to the wrist with soft hands. I applied pressure when the lab technician was coming up to draw the blood because Mr. Hanna started to pull away. *Pressure was applied. He was told repeatedly. At which time he complied after the pain was applied to him.*

Q: Pain, it sounds pretty bad. Was it pinching? How does it all work?

A: It's just through pressure points that are learned through our training. *It's not a permanent pain. It's just real quick and simple. It is used for compliance for subjects that aren't cooperative.*

* * * *

Q: In the case here with Mr. Hanna how long did you have them applied to him?

A: A few seconds.

Q: And was the degree of pressure constant as far as the pair of restraints you were controlling?

A: There was a short, very short, period of pressure, maybe two seconds, at which time he laid still. At that time the pressure was released and Mr. Hanna was informed if he didn't comply further pressure was going to be reapplied.

Q: Now, what was his response to that statement?

A: At that time, he laid still.

(Quoted in *Hanna*, 567 N.W.2d at 18 (MacKenzie, J., dissenting; emphasis in original).

The Do-Rite sticks were thus not used as restraining devices to keep Petitioner in place during the blood draw. They were used solely as instruments of pain. There is also no dispute from the record that the Do-Rite sticks inflict severe pain. Officer LaCross agreed that the device causes pain to radiate up the subject's arm, and Petitioner himself testified that the experience was "very, very painful" and that his wrists were sore for two weeks.

As the dissents in both Michigan appellate courts recognized, there is a constitutional distinction between pain inflicted as an incident to lawful Fourth Amendment activity, such as the pain caused when the police tackle a fleeing suspect, and pain deliberately inflicted to coerce compliance. *Hanna*, 567 N.W.2d at 19 (MacKenzie, J., dissenting); *Hanna*, 459 Mich. at 1002 (Kelly, J., dissenting). This Court has recognized that even the former type of pain is unreasonable under some circumstances, even when the police have full probable cause to conduct the underlying search or seizure. *Schmerber* at 771-772 (recognizing pain inflicted during blood draw at police station may be unreasonable); *Winston v. Lee*, 470 U.S. 753, 759-766 (1985) (holding surgery to recover bullet unreasonable); *Garner*, 471 U.S. at 11 (holding use of deadly force to stop fleeing non-violent felon unreasonable).

The latter type of pain, inflicted solely to coerce compliance, is always unreasonable. As one of the dissents in the Michigan Supreme Court observed, the use of such techniques "violates fundamental values that separate this society from less enlightened systems of governance." *Hanna*, 459 Mich. at 1002 (Kelly, J., dissenting).

If, as the majority of the Michigan Supreme Court held, the police conduct was reasonable because "the officers used the Do-Rite sticks for only a few seconds and defendant was not

injured," *Hanna*, 459 Mich. at 998, it should also be reasonable for the police to apply electric shocks to the genitals of a recalcitrant drunk driving suspect, a technique used to gain "compliance" in Saddam Hussein's Iraq. It should also be reasonable to hold such a person's head underwater until he "complies," a favorite technique during the military dictatorship in Argentina.

The point is clear: if the use of a pain-inflicting device is reasonable so long as it is applied "for only a few seconds" and so long as the victim is "not injured," *Hanna*, 459 Mich. at 998, then there is no reason why the police may not employ many of the techniques used by unsavory regimes to torture their citizens into "compliance." As this Court recognized long ago in *Rochin v. California*, 342 U.S. 165, 172 (1952), some methods of obtaining evidence, such as stomach pumping, cannot be condoned because they "are too close to the rack and the screw to permit of constitutional differentiation."

In stark contrast to the Michigan Supreme Court's approach, the Fifth Circuit has held that a person "is no longer required to prove significant injury to assert a section 1983 Fourth Amendment excessive force claim." *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994); compare *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (rejecting argument that prisoner must demonstrate "serious injury" to state Eighth Amendment claim). Petitioner submits the Fifth Circuit's approach is correct and that the use of excruciating pain to obtain evidence is simply unreasonable within the meaning of the Fourth Amendment even if the police do not inflict permanent or serious injury.[4]

---

[4] The Michigan Supreme Court majority's reliance on *Forrester v. San Diego*, 25 F.3d 804 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995), is misplaced. *Forrester* (continued...)

In short, the police in this case violated the reasonableness requirement of the Fourth Amendment by inflicting severe pain upon a suspected drunk driver in order to force him to comply with their efforts to obtain a blood sample. Such techniques are unreasonable in every case and were wholly unjustified in this case.

---

[4](...continued)

involved a civil lawsuit in which arrestees sued police officers who used "Do-Rite" sticks to force them to board a police bus. On appeal, the Ninth Circuit upheld a jury verdict that the force used was not excessive. *Id.* at 807. As the dissent in *Forrester* pointed out, "we have not decided that pain compliance techniques are constitutionally permissible as a matter of law. We have done no more than let a jury verdict stand because there was evidence on which the majority believes rational jurors could have based a verdict." *Id.* at 809 (Kleinfeld, J., dissenting).

## CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

/s/_____
Kary L. Moss
(Counsel of Record)
Michael J. Steinberg
American Civil Liberties Union
Fund of Michigan
1249 Washington Blvd., Ste. 2910
Detroit, Michigan 48226-1822
(313) 961-7728

David Rudovsky
924 Cherry Street, Ste. 500
Philadelphia, PA 19107
(212) 925-4400

Attorneys for Petitioner

Dated: September 6, 1999

## Appendix A

**People of the State of Michigan,**
Plaintiff-Appellee,

v.

**Eric Rural Hanna,**
Defendant-Appellant.

**Michigan Supreme Court**

Docket No. 109985
June 30, 1998

Leave to appeal DENIED.

MALLETT, C.J., and CAVANAGH and KELLY, JJ.
We would grant leave to appeal.

## APPENDIX B

**People of the State of Michigan,**
Plaintiff-Appellee,

v.

**Eric Rural Hanna,**
Defendant-Appellant.

**Michigan Supreme Court**

Docket No. 109985.
June 8, 1999.

On order of the Court, the motion for reconsideration of this Court's order of June 30, 1998 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

We deny leave to appeal in this case because the Court of Appeals properly applied the "objective reasonableness" test set forth in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Forrester v. San Diego*, 25 F.3d 804 (C.A.9, 1994). The officers used a reasonable amount of force in light of the surrounding facts and circumstances. This conclusion is well supported by the Court of Appeals reasoning:

> [T]he laboratory technician testified that he could not have safely drawn defendant's blood unless defendant ceased his combative conduct. Indeed, were he not pacified, defendant could have injured himself or others by causing the needle to inadvertently lacerate or break.

> With the obvious harm inherent by [sic] a misdirected or broken needle, the police were legitimately concerned about subduing defendant in order to facilitate the safe and effective execution of the warrant. Otherwise defendant could have caused injury and thwarted the execution of the warrant.

Moreover, the officers used the Do-Rite sticks for only a few seconds and defendant was not injured. In light of the circumstances, the officers' limited and measured use of the Do-Rite sticks in this case satisfied the objective reasonableness test set forth in *Graham* and *Forrester*.

In his dissent, Justice CAVANAGH suggests that we grant reconsideration and leave, and invite amicus briefs as a means of suggesting to the Legislature possible alternative remedies in this type of situation. Justice CAVANAGH'S dissent fails to address the dispositive issue, i.e., whether the officers' use of the Do-Rite sticks met the constitutional test of objective reasonableness.

Justice CAVANAGH suggests a legislative presumption of intoxication for those who refuse the blood test. This suggestion does not solve the practical problem for all suspects who refuse to give blood. Suppose hypothetically that a murder suspect refuses to give blood that is needed for DNA testing. We doubt that Justice CAVANAGH would support a legislative presumption that the defendant was guilty of murder or that his DNA type matched that of blood found at the murder scene. Justice CAVANAGH has thus failed to provide either a practical solution or a rebuttal to our analysis under the objective reasonableness test.

If this Court were to adopt Justice KELLY'S position, a suspect could avoid a search warrant to test blood alcohol level simply by refusing to cooperate with the medical personnel as they attempted to draw blood. Justice KELLY asserts that the officers induced unnecessary pain to subdue a single unarmed

arrestee. This statement suggests that she would prefer the officers to use their bare hands to manhandle the suspect into compliance with the blood test, risking injury, rather than using department-issued tools in which the officers had been trained and which were less likely to produce injury. We reject this suggestion.

Justice KELLY'S dissent also asserts that the police should have used alternative measures, such as hospital restraints, to achieve compliance with the search warrant. Justice KELLY fails to identify a constitutional basis for her stated preference for other measures. This Court should not dictate those law enforcement techniques it prefers absent a constitutional basis for intervention. Because the use of the Do-Rite sticks in these circumstances met the constitutional test of objective reasonableness, our inquiry should end. Justice KELLY'S stated preference for alternative law enforcement measures has no bearing on the constitutional analysis.

Justice BRICKLEY would grant reconsideration and, upon reconsideration, would grant leave to appeal.

Justice CAVANAGH dissents, and states:

I know of no other area of law in which we allow the police to use pain coercion where there is no threat of harm to persons or property. Here, the majority is allowing pain coercion/bodily violence to collect evidence. This fuels the situation and converts a non-violent refusal of a blood test into a physical confrontation involving the police, the suspect, and possibly the hospital staff.

I am persuaded the issue presented by this case is significant. A grant, inviting amicus, might provide appropriate alternatives for police officers faced with suspects that refuse to comply with a search warrant. It also might lead us to the conclusion that we could only urge the legislature to address this question and devise a workable alternative, such as allowing for a

presumption of intoxication for those who refuse the blood test. This would 1) remove violence from the equation; 2) allow the prosecution to introduce evidence of the defendant's condition; 3) deter a drunk driving suspect from refusing the test (he could at least hope that the blood test would produce a reading low enough to charge him with the lesser crime of impaired driving); 4) protect hospital staff from injury; and 5) lessen the number of suits against the police for civil rights violations.

Accordingly, I would grant reconsideration and, upon reconsideration, would grant leave to appeal.

Justice KELLY dissents, and states:

I dissent from the Court's order denying defendant's motion for reconsideration, because I believe the denial is in error. This case presents an issue that has broad jurisprudential significance, and the Court of Appeals opinion is published, hence binding on it and lower courts. The issue is whether police use of "Do-Rite Sticks"[1] intentionally inflicting pain to obtain compliance with search warrants is a reasonable search and seizure under both the United States and Michigan Constitutions. I submit that it is not. By denying reconsideration of its denial of leave, this Court allows police, under the circumstances of this case, to engage in a torture tactic to facilitate a search warrant.

The underlying facts of the case are that defendant was

---

[1] "Do-Rite sticks" are nunchakus, a martial arts tool that has two rigid sticks of wood, metal, or plastic, with a flexible connection of chain, cord, or rope. The Sault Ste. Marie police used nunchakus made of plastic, connected with a one-inch piece of rope. The device has many alternative names and spellings, including nonchakus, numchucks, num-chucks, nunchucks, kung fu sticks, and karate sticks.

apparently operating a vehicle over the speed limit in the City of Sault Ste. Marie when several police officers stopped him. They soon determined that he was driving while intoxicated. After arresting him, they obtained a search warrant to test his blood and took him to War Memorial Hospital to have a sample drawn. Defendant refused to cooperate, however, and the officers squeezed his wrists with Do- Rite sticks. The blood was drawn and testing indicated 0.15 percent weight per volume of ethyl alcohol. This evidence was admitted at the defendant's trial, and he was convicted of OUIL.

At the preliminary examination, one of the arresting officers described the Do-Rites as "a restraining device that we, all members of the department carry now, it's for restraining arms." He said that the defendant "pulled his arm away, that's when we used the do-rites on him-and then he cooperated, and then he couldn't resist us any more at that point." The hospital laboratory technician who drew the blood said that the defendant had refused to cooperate until the police "put his arms into the restraints and held him there."

The second arresting officer testified that defendant was angry and would not cooperate. He stated that he was concerned with safety and used the nunchakus, applying them to the defendant's wrists "with soft hands" for a "few seconds." He applied the nunchakus to a pressure point on the wrist, which caused pain to radiate into defendant's arm. Defense counsel obtained the admission that the officer testifying is a large man who lifts weights and is quite strong.

The first officer described defendant's anger and the ensuing application of the nunchakus. Asked why the nunchakus were used, he responded:

> It's a simple way of controlling the subject that is uncooperative, fighting, won't exit the vehicle. They have worked excellently drawing blood from people who aren't cooperating with it.

He also testified that they argued with the defendant for several minutes. He decided to apply the nunchakus because he could not "let a subject argue all evening." He "exerted pressure just a few seconds, just enough to make him cooperate." The defendant stated that the pain shot up his arms into his shoulders and his wrists were sore for two weeks. He complied with the search warrant to avoid feeling additional pain.

I submit that the evidence obtained against defendant through the use of the Do-Rite sticks should have been suppressed. I believe that the use of this pain-inflicting device to obtain compliance in furnishing evidence for a prosecution violated the defendant's right to be free from unreasonable searches and seizures.[2] *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Although there is no case directly on point, the United States District Court for the District of Maryland has said, "[o]f course, unreasonable physical violence in administering [a chemical] test would likely not be sanctioned and would likely invalidate the test." *United States v. Sauls*, 981 F.Supp. 909, 913 (D.Md., 1997).

Police use of nunchakus has drawn attention in other cases. *Herrera v. Conner*[3] was a 42 U.S.C. 1983 action filed in the wake of an arrest involving a great deal of force. The police used nunchakus on the arrestee's arm. Looking at the circumstances in their entirety, including the use of other forms of physical coercion, the Idaho Court of Appeals said, "We hold that reasonable minds could conclude that excessive force was used." *Herrera, supra* at 1021, 729 P.2d 1075.

---

[2] U.S. Const., Amends. IV & XIV, § 1; Mich. Const. 1963, art. 1, § 11.

[3] 111 Idaho 1012, 729 P.2d 1075 (Idaho App., 1986), app. dis. 112 Idaho 948, 738 P.2d 94 (1987).

In *Johnson v. Panizzo*[4], another 42 U.S.C. 1983 case, several officers beat the plaintiff without cause when arresting him. One issue at trial was whether the Joliet Police Department had a policy of encouraging the use of excessive force. Evidence was admitted showing that the department taught and encouraged the use of blackjacks and nunchakus in making arrests. *Johnson, supra* at 337, 342. The court was persuaded that the plaintiff had produced evidence of a knowing and deliberate indifference to the use of excessive force.[5]

In *People v. Bracamonte*, 15 Cal.3d 394, 124 Cal.Rptr. 528, 540 P.2d 624 (1975)[6], the police obtained a warrant authorizing the search of a house that the defendant and her husband occupied. The warrant included their vehicles and their "persons." As the police closed in, they saw defendant swallow what they later confirmed were several balloons of heroin. They took her to a hospital emergency room, presented the search warrant and requested that her stomach be pumped. The doctor prepared an emetic solution known as syrup of ipecac. When the suspect resisted, the nurses inserted a rubber tube through her nostril and into her esophagus. After about five minutes, she said that the tube was "too painful," and agreed to drink the emetic. She then regurgitated seven balloons of heroin. She continued to vomit for about ten minutes, and was nauseous for about another fifteen minutes.

The California Supreme Court in *Bracamonte* said that the search went beyond the scope of the warrant, which authorized only a search of the defendant's "person." The court also found no basis for a warrantless search. Since the police had no

---

[4] 664 F.Supp. 336 (N.D.Ill., 1987).

[5] Evidently, the Joliet Police Department ceased using nunchakus several years later. *Smith v. Joliet*, 965 F.2d 235, 237 (C.A.7, 1992).

[6] 15 Cal.3d 394, 124 Cal.Rptr. 528, 540 P.2d 624 (1975).

warrant, and no basis to proceed without a warrant, the court excluded the evidence. It did not reach the issue whether the circumstances in which the search was carried out violated due process. However, the court observed that "a search, even if justified at its inception, may be unconstitutional by virtue of its intolerable intensity and scope." *Bracamonte, supra* at 404.

In the present case, the dissenting Court of Appeals judge quoted from the dissent in *Forrester v. San Diego*[7], a federal action involving the use of excessive force. The police had applied nunchakus on anti-abortion protestors engaged in passive resistance. While a majority upheld the police action, the *Forrester* dissenter noted its ineffectiveness and the fact that several persons had been injured. The dissenter observed that the police had been using pain as punishment, rather than as a means to move the demonstrators.

Like the dissenter in *Forrester* and the dissenting judge in the Court of Appeals, I am persuaded that an unreasonable amount of force was employed in this case. The dissenter in *Forrester* considered several matters, including (a) whether the use of force was a split-second judgment in response to events at the scene, (b) the severity of the offense, (c) the degree of resistance, and (d) the immediacy of a threat to the officers or others. Using these criteria, the dissenter found no need to apply nunchakus to the passive resisters. *Id.* at 810-814. I likewise find that the use of nunchakus is unreasonable where the only difficulty is a person's resistance to having blood drawn.

To be clear, the police in this case had a warrant that authorized a search of the defendant's blood. However, the search was conducted in a manner that was unreasonable because of the application of excessive force in the form of a "pain compliance" device. Judge MacKenzie distinguished in her dissent the constitutionally protected use of force that may cause incidental pain and the constitutionally proscribed direct

---

[7] 25 F.3d 804 (C.A.9, 1994).

infliction of pain to coerce desired behavior. She concluded that police used the Do-Rite sticks as a punishment device that "inflict[ed] pain to coerce a person into compliance."[8] The inducement of unnecessary pain by two able police officers to subdue a single unarmed arrestee violates fundamental values that separate this society from less enlightened systems of governance.

It was undisputed that it took a matter of seconds to draw the blood. I do not support allowing a suspect simply to refuse to cooperate. However, the two officers should have been able to restrain the supine defendant for such a brief time without resorting to pain compliance devices. I do not advocate manhandling a suspect with bare hands in order to subdue him. The evidence in this case was that hospital restraints were available to hold down Mr. Hanna. In any event, the police are trained in appropriate measures to subdue suspects. While these alternative procedures have the potential to cause incidental pain, they do not directly inflict pain.[9]

As the California Supreme court has stated:

> [A] search, even if justified at its inception, may be unconstitutional by virtue of its intolerable intensity and scope. Furthermore, the use of excessive force which shocks the conscience violates due process of law. [*Bracamonte, supra* at 404-405.]

For the reasons enumerated in this statement, I would grant the motion for reconsideration, reverse the judgment of the Court of Appeals, and vacate in part the judgment of the circuit

---

[8] *People v. Hanna*, 223 Mich.App. 466, 483 (1997).

[9] Contrary to the majority's assertion, I am not advocating a rule that police officers use hospital restraints. I am merely pointing out that the police had a variety of constitutionally protected methods from which to choose.

court. I would remand this case for a new trial with an instruction that the circuit court exclude the evidence obtained through the application of the nunchakus to the defendant's arm.

## APPENDIX C

**People of the State of Michigan,**
Plaintiff-Appellee,

v.

**Eric Rural Hanna,**
Defendant-Appellant.

**Michigan Court of Appeals**

Docket No. 183094.

Submitted Oct. 17, 1996, at Escanaba.
Decided May 16, 1997, at 9:00 a.m.
Released for Publication Aug. 6, 1997.

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, Patrick M. Shannon, Prosecuting Attorney, and William E. Molner, Assistant Attorney General, for People.

Rudolph F. Perhalla, Ironwood, for Defendant-Appellant on appeal.

Before GRIBBS, P.J., and MacKENZIE and GRIFFIN, JJ.

GRIFFIN, Judge.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of liquor, M.C.L. § 257.625; M.S.A. § 9.2325, and attempting to resist and obstruct a police officer, M.C.L. § 750.479; M.S.A. § 28.747; M.C.L. § 750.92;

M.S.A. § 28.287. He pleaded guilty of being a third-time OUIL offender and was sentenced to concurrent terms of two to five years' imprisonment for the OUIL 3rd conviction and six months to one year for the attempted resisting and obstructing conviction. Defendant appeals as of right both convictions. We affirm. In doing so, we hold that, under the totality of the circumstances of this case, the police did not violate defendant's Fourth Amendment rights by briefly restraining him with a pain compliance device in order to execute a warrant for a blood sample.

I

After the police stopped defendant for speeding, he stumbled out of his vehicle, stood unsteadily, and with slurred speech admitted that he had been drinking. Thereafter, defendant failed a field sobriety test, refused to take a Breathalyzer examination, and vomited in his jail cell. While arresting officers Bradley LaCross and Michael Troyer drove defendant to a hospital to execute a warrant to draw a sample of defendant's blood, defendant proclaimed repeatedly in a loud, angry voice that he would not permit anyone to draw his blood.

Defendant became "very uncooperative" at the hospital and refused to lie on the examination table. Defendant jerked his arm away from the laboratory technician who attempted to draw his blood. Concerned about the safety threat posed by defendant's evasive conduct, the two officers restrained defendant by laying him on the examination table and applying for "a few seconds" "Do-Rite sticks"[10] to pressure points on defendant's wrists. The pressure subdued defendant, who then relaxed and permitted the laboratory technician to draw his blood.

---

[10] This device is spelled inconsistently in the briefs and record as either "Do-Rite" or "Do Right."

Officer LaCross described Do-Rite sticks as being two plastic rods connected with a one-inch cord. The device is used by wrapping the cord around certain pressure points and exerting pressure by briefly pulling or twisting the handles.[11] LaCross testified that the device inflicts a "quick and simple" discomfort that causes no injury or lasting pain. According to LaCross, all Sault Ste. Marie police officers receive training before receiving certification to carry and use Do-Rite sticks.

After trial, defendant claimed that the use of Do-Rite sticks constitutes cruel and unusual punishment. The trial court rejected defendant's argument finding that, under the circumstances of this case, the police used Do-Rite sticks "in a reasonable fashion[ ]" to "subdue" defendant and execute the warrant.

II

Defendant claims that it is "cruel and unusual for the police to have the ability to forcibly draw blood from an individual for a violation of the motor vehicle code." However, because defendant cites no authority to support this proposition, we consider the issue to be waived. *People v. Piotrowski*, 211 Mich.App. 527, 531, 536 N.W.2d 293 (1995). Furthermore, the Eighth Amendment is inapplicable because defendant was only a detainee at the time of the alleged misconduct. *Brewer v. Perrin*, 132 Mich.App. 520, 529, n. 3, 349 N.W.2d 198 (1984), citing *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16, 99 S.Ct. 1861, 1872, n. 16, 60 L.Ed.2d 447 (1979).

Nevertheless, the dissent cites *Rochin v. California*, 342 U.S. 165, 166, 72 S.Ct. 205, 206-207, 96 L.Ed. 183 (1952), for the proposition that the use of Do-Rite sticks to subdue a

---

[11] Because the use of these Do-Rite sticks was not made an issue at trial, the record does not fully depict how this device is made or used.

combative detainee violates the Due Process Clause of the Fourteenth Amendment. However, in *Graham v. Connor*, 490 U.S. 386, 388, 392-393, 394, 109 S.Ct. 1865, 1867-1868, 1869-1870, 1870-1871, 104 L.Ed.2d 443 (1989), the United States Supreme Court specifically rejected the amorphous "substantive due process," or "shock the conscience" approach applied in *Rochin, supra,* and held that excessive force claims must be analyzed under the Fourth Amendment's "objective reasonableness" standard. See also *Lester v. Chicago*, 830 F.2d 706, 710-711 (C.A.7, 1987). Thus, the issue is whether the search and seizure is unreasonable under the Fourth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment; not whether the search and seizure violates Due Process. See *Electro-Tech, Inc. v. H F Campbell Co.*, 433 Mich. 57, 127-128, 445 N.W.2d 61 (1989) (Brickley, J., dissenting); *Lester, supra* at 710-711.

In determining the reasonableness of a particular seizure, we must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham, supra* at 396, 109 S.Ct. at 1871 (internal quotations marks omitted); see *People v. Holloway*, 416 Mich. 288, 299, 330 N.W.2d 405 (1982). In excessive force cases, we determine if the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, not with 20/20 hindsight. *Graham, supra* at 397, 109 S.Ct. at 1872; *Hammer v. Gross*, 932 F.2d 842, 846 (C.A.9, 1991). Because drawing blood is not, in itself, unreasonable under the Fourth Amendment, see *Schmerber v. California*, 384 U.S. 757, 771, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966); *People v. Perlos*, 436 Mich. 305, 313, 462 N.W.2d 310 (1990), we must decide whether police officers may use Do-Rite sticks to subdue a suspect who is resisting a legal warrant to draw blood.

No Michigan case directly addresses this issue. However, in *Holloway, supra*, our Supreme Court held that the police

acted reasonably in pressing on the suspect's throat and pinching the pressure points on his jaw to gain access to and search his mouth for hidden evidence. See also *Wayne Co. Prosecutor v. Recorder's Court Judge*, 149 Mich.App. 183, 187, 385 N.W.2d 652 (1986). Thus, it is not necessarily unreasonable for police to painfully manipulate pressure points as a means to search for dissolvable evidence. *Holloway, supra*; *Recorder's Court Judge, supra*. Because pain compliance techniques are not necessarily illicit, *Holloway, supra*, the issue is not whether Do-Rite sticks are unconstitutional because they cause temporary pain. Rather, the issue is whether the kind or degree of pain caused by Do-Rite sticks is unreasonable under the circumstances of this case.

In *Forrester v. San Diego*, 25 F.3d 804 (C.A.9, 1994), cert. den. 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1070 (1995), the Ninth Circuit Court of Appeals addressed the reasonableness of using a device similar to Do-Rite sticks. In a 2-1 decision, the majority upheld a jury finding that San Diego police officers did not use excessive force in using "Orcutt Police Nonchakus" (two wooden sticks each connected at one end by a cord) to disperse demonstrators who resisted arrest by going limp. Noting that the device seemed to cause less pain than other permissible compliance techniques, the *Forrester* majority held that police acted reasonably in twisting the device around the wrists of demonstrators whom they were trying to arrest or disperse. *Id.* at 807, 809. The dissent agreed that intentional infliction of pain by police is not unconstitutional per se. *Id.* at 814 (Kleinfeld, J., dissenting). However, the dissenting judge opined that, because the technique proved totally ineffective at moving the limp demonstrators, the continued use of the device was done to "punish" nonviolent, passively resisting demonstrators "for refusing to get up and walk." *Forrester, supra* at 811-813. Because it was used for no reason other than to punish, the

dissenting judge deemed the continued use of the device to be unreasonable. *Id.*

III

In the present case, after evaluating the totality of the circumstances, we agree with the ruling of the trial court and hold that the police acted reasonably in briefly using Do-Rite sticks to subdue defendant and ensure the safe execution of the search warrant. First, the police clearly had a strong and legitimate interest in executing the warrant to draw defendant's blood as soon as possible. See *Perlos, supra* at 327-328. Further, the laboratory technician testified that he could not have safely drawn defendant's blood unless defendant ceased his combative conduct. Indeed, were he not pacified, defendant could have injured himself or others by causing the needle to inadvertently lacerate or break. With the obvious harm inherent by a misdirected or broken needle, the police were legitimately concerned about subduing defendant in order to facilitate the safe and effective execution of the warrant. Otherwise, defendant could have caused injury and thwarted the execution of the warrant.

Second, the nature and quality of the intrusion on defendant's person was not severe, unnecessary, or unduly intrusive. Officer LaCross and the laboratory technician testified that defendant was so combative that handcuffs and bed restraints would not have effectively prevented him from moving during the drawing of his blood. Even if the two officers were large and strong enough to control the defendant without using Do-Rite sticks, it is doubtful whether the force exerted in physically overpowering, positioning, and holding the combative defendant would have been less violent or caused less pain than the quick application of the Do-Rite sticks. In addition, we question whether without extreme force or the potential for pain the two officers could have held defendant

still enough to ensure a safe, effective blood test. On this issue, we agree with the Ninth Circuit majority in *Forrester, supra* at 807-808 that

> [p]olice officers ... are not required to use the least intrusive degree of force possible. Rather, as stated above, the inquiry is whether the force that was used to effect a particular seizure was reasonable, viewing the facts from the perspective of a reasonable officer on the scene. See *Graham*, 490 U.S. at 396. Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue. See *Hammer*, 932 F.2d at 846.

Defendant makes no claim that the sticks caused him severe pain or injury. On the contrary, the laboratory technician testified that defendant showed no signs of pain whatsoever. Furthermore, unlike the scene depicted by the dissenter in *Forrester*, the evidence in this case does not establish that the police used Do-Rite sticks simply to punish. Rather, Officer LaCross applied the sticks only for a few seconds to subdue and protect the safety of the combative defendant. Under these circumstances, we agree with the trial court that the Do-Rite sticks were reasonably applied and constituted a reasonable means of controlling defendant and executing the search warrant. Indeed, the pain caused by the brief application of Do-Rite sticks appears less severe than the choke hold and jaw poking our Supreme Court deemed reasonable in *Holloway*. If the use of Do-Rite sticks were held to be unreasonable simply because they briefly inflict pain, then not only is *Holloway* wrongly decided, but arm twisting, limb holds, and many other commonly used and essential compliance methods would be unconstitutional. We will not subscribe to such an oppressive and unnecessary restriction of law enforcement.

IV

There is no merit in defendant's remaining issues on appeal. Defendant claims that a new trial is required because there were no black jurors. However, defendant did not challenge the jury array below, and he cites no legal authority to support his argument on appeal. Therefore, defendant has abandoned this unpreserved issue. *People v. Hubbard (After Remand)*, 217 Mich.App. 459, 465, 552 N.W.2d 493 (1996); *Piotrowski, supra* at 530. In any event, defendant has not shown that black citizens were purposely or systematically excluded from the jury. *Hubbard, supra* at 473.

Defendant also argues that the trial court committed error requiring reversal in admitting testimony regarding defendant's performance on field sobriety tests. However, defendant again fails to cite authority in support of his argument. Thus, this issue is also abandoned. *Piotrowski, supra* at 530. Nevertheless, the evidence was relevant to establish defendant's drunkenness and lay witnesses are qualified to testify about the opinions they form as a result of direct physical observation. MRE 701; *Lamson v. Martin (After Remand)*, 216 Mich.App. 452, 459, 549 N.W.2d 878 (1996).

Next, defendant contends that the search warrant authorizing police to draw defendant's blood was not based on probable cause. We disagree. Defendant's preliminary breath test, which indicated a 0.169 blood alcohol level, in itself justifies a reasonable person's conclusion that defendant's blood could reveal an alcohol level exceeding the limit for lawful driving. See, generally, *People v. Stumpf*, 196 Mich.App. 218, 226-227, 492 N.W.2d 795 (1992); *People v. Tracy*, 186 Mich.App. 171, 174, 463 N.W.2d 457 (1990). This is especially true where defendant staggered out of his vehicle, admitted that he had been drinking, made several errors in reciting the alphabet, and vomited in his jail cell. *Stumpf, supra* at 226-227.

Defendant also argues that the results of his blood test were

inadmissible because his blood was not timely drawn. Again, we disagree. The reasonableness of any time lapse is consigned to the trial court's sound discretion. *People v. Schwab*, 173 Mich.App. 101, 104, 433 (1988). We find no abuse of discretion. Particularly where an expert testified that the delay was reasonable, a seventy-minute delay, without more, does not render the blood evidence inadmissible. See *People v. Jacobsen*, 448 Mich. 639, 641, 532 N.W.2d 838 (1995).

Next, defendant claims that reversal is required because a police officer testified that he requested a "PBY" (preliminary breath test) from defendant. However, the trial court ordered the testimony stricken, and the jurors did not learn of the test results. Contra *People v. Keskinen*, 177 Mich. App. 312, 319-320, 441 N.W.2d 79 (1989). Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis. *People v. Herbert*, 444 Mich. 466, 477, 511 N.W.2d 654 (1993); see *People v. McAlister*, 203 Mich.App. 495, 504, 513 N.W.2d 431 (1994).

Defendant also argues that the prosecutor committed several instances of misconduct. We disagree. In any event, even if we assume arguendo that the prosecutor made some improper remarks, the prejudicial effect of the unobjected-to and relatively innocuous comments was not so great that they could not have been cured by a cautionary instruction. *People v. Vaughn*, 186 Mich.App. 376, 385, 465 N.W.2d 365 (1990).

Defendant contends that the trial court should have granted defendant a new trial because the trial court admitted testimony regarding defendant's willingness to "make a deal." However, because the trial court sustained defendant's objection and followed both parties' motions to strike this testimony from the record, we find no error. See *McAlister, supra* at 504.

Next, defendant claims that he was denied the effective assistance of counsel. We disagree. After a thorough review of the record, we conclude that defendant has neither sustained his

burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v. LaVearn*, 448 Mich. 207, 213, 528 N.W.2d 721 (1995); *People v. Stanaway*, 446 Mich. 643, 666, 687-688, 521 N.W.2d 557 (1994); see also *People v. Hyland*, 212 Mich.App. 701, 710, 538 N.W.2d 465 (1995), vacated in part on other grounds 453 Mich. 900, 554 N.W.2d 899 (1996).

Finally, defendant contends that the verdict was against the great weight of the evidence. We disagree. There was ample evidence to sustain defendant's convictions. *People v. Wolfe*, 440 Mich. 508, 515, 489 N.W.2d 748 (1992), amended 441 Mich. 1201 (1992).

Affirmed.

GRIBBS, P.J., concurred.

MacKENZIE, Judge (concurring in part and dissenting in part).

I respectfully dissent from that portion of the majority opinion upholding the use of "Do-Rite sticks." In my opinion, the evidence obtained against defendant through the use of the Do-Rite sticks should have been suppressed because the use of these pain compliance devices to obtain evidence for a prosecution violated the Due Process Clause of the United States Constitution. In all other respects, I concur.

Arresting officer Bradley LaCross described the nature of Do-Rite sticks, and the use of the devices on defendant to obtain his compliance with the taking of a blood sample, as follows:

Q. What steps occurred then to get ahold of the situation?

A. He was asked to lay [sic] down on the bed, which he refused to do. Finally, he was informed to lay [sic] down or we would lay him down on the bed, at which time Officer Troyer and myself laid Eric Hanna down on the bed and the do right [sic] sticks were applied to his wrists.

Q. And the do right [sic] sticks are restraints? I would just maybe have you explain to the jury what that is.

A. They are two pieces of plastic approximately this long attached by approximately a one-inch rope. They are used to restrain people, are considered a technique for compliance.

Q. What effect do they have upon the person they are applied to?

A. They are designed to gain compliance. *Once compliance is gained the pressure is supposed to be relieved in order to not cause any injury or long-term pain.*

* * * * * *

Q. And just explain to the jury as far as your action and your use of them as to Mr. Hanna. How did you do that?

A. How did we apply them?

Q. You say there was control on the amount of pressure?

A. I applied it at the wrist with soft hands. I applied pressure when the lab technician was coming up to draw the blood because Mr. Hanna started to pull away. *Pressure was applied. He was told repeatedly. At which time he complied after the pain was applied to him.*

Q. Pain, it sounds pretty bad. Was it pinching? How does it all work?

A. It's just through pressure points that are learned through our training. *It's not a permanent pain. It's just real quick and simple. It is used for compliance for subjects that aren't cooperative.*

Q. You indicated, I thought, soft hands, if I am quoting you correctly. What does that denote and relate it to other types of procedures that you might have used.

A. It wasn't used as a restraining instrument or any type of a weapon for use of force that way.

Q. Okay. Are they able to be used in that manner?

A. Yes, they are.

* * * * * *

Q. If you had not had the do right [sic] devices at this time, Officer, would you have been able to get the blood?

A. No.

* * * * * *

Q. In the case here with Mr. Hanna how long did you have them applied to him?

A. A few seconds.

Q. And was the same degree of pressure constant as far as the pair of restraints you were controlling?

A. There was a short, very short period of pressure, maybe two seconds, at which time he laid [sic] still. At that time the pressure was released and Mr. Hanna was informed if he didn't comply further pressure was going to be reapplied.

Q. Now, what was his response to that statement?

A. At that time he laid [sic] still. [Emphasis added.]

Defendant asserts that, as a matter of law, giving the police the ability to forcibly draw blood from an individual for a violation of the Vehicle Code amounts to cruel and unusual punishment, presumably under the Eighth Amendment. Because defendant was merely a detainee, however, the Eighth Amendment does not apply. See *Brewer v. Perrin*, 132 Mich.App. 520, 529, n. 3, 349 N.W.2d 198 (1984). Nevertheless, the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. *Graham v. Connor*, 490 U.S. 386, 395, n. 10, 109 S.Ct. 1865, 1871, n. 10, 104 L.Ed.2d 443 (1989); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

The state may force a person suspected of driving while intoxicated to submit to a blood alcohol test. *South Dakota v. Neville*, 459 U.S. 553, 559, 103 S.Ct. 916, 920, 74 L.Ed.2d 748 (1983); *Schmerber v. California*, 384 U.S. 757, 771, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966). Thus, in this case, requiring defendant to allow a sample of his blood to be taken did not in itself violate his substantive due process rights. However, as noted in *Schmerber*, supra, "[i]t would be a different case if the police ... responded to resistance with inappropriate force." *id.* at 760, n. 4. See also *Neville, supra* at 559, n. 9; *People v. Holloway*, 416 Mich. 288, 299, 330 N.W.2d 405 (1982). In my opinion, the police in this case did just that.

In *Rochin v. California*, 342 U.S. 165, 166, 72 S.Ct. 205, 206-207, 96 L.Ed. 183 (1952), police officers entered the defendant's home and observed him place some capsules in his mouth. The officers attempted to forcibly extract the capsules but were unable to do so. Following this,

> [Rochin] was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine. [*Id.* at 166, 72 S.Ct. at 206.]

Eventually, the defendant was convicted of illegally possessing morphine. The Supreme Court, in reversing Rochin's conviction under the Due Process Clause, stated:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. [*Id.* at 172.]

Since *Rochin* was decided, the Supreme Court has clarified that claims of excessive force under the Due Process Clause should be analyzed under the Fourth Amendment "reasonableness" standard. *Graham, supra* at 395. The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of all the relevant circumstances. *Hammer v. Gross*, 932 F.2d 842, 846 (C.A.9, 1991).

The use of the Do-Rite sticks in this case was not reasonable

under all the circumstances. Two officers were with defendant when his blood was drawn by a medical technician. Defendant repeatedly insisted that he did not want to be stuck with a needle because he was afraid of contracting AIDS. The officers each used the Do-Rite sticks when defendant, who was lying on a hospital bed, pulled his arms inward against his chest. Unquestionably, it was necessary to restrain defendant's movement for his own safety. Nevertheless, in my opinion, the use of the Do-Rite sticks was excessive. The record indicates that defendant was 5'9" tall and weighed 170 pounds. Officer LaCross, on the other hand, was 6'1" and weighed 250 pounds; he was a weight lifter who could bench press 300 pounds. Officer Troyer was 5'11" and weighed 215 pounds. It was undisputed that it took a matter of seconds to draw the blood. The two officers should have been able to restrain the supine defendant for such a brief time without resort to pain compliance devices. There was also evidence that hospital restraints were available to the officers. Under these circumstances, I find it both shocking and unreasonable that defendant was forced into compliance through the use of pain-inflicting devices.

The propriety of using devices called "Orcutt Police Nonchakus," pain compliance tools which, like Do-Rite sticks, consist of two sticks each connected at one end by a cord, was addressed in *Forrester v. San Diego*, 25 F.3d 804 (C.A.9, 1994). Over a dissent, the two-judge majority upheld a jury finding that the police did not use excessive force in using the nonchakus against demonstrators. The dissenter distinguished between the use of *force* (possibly causing incidental pain) and the *direct infliction of pain* to coerce a person to act a certain way, and noted that the latter is, at least generally, constitutionally proscribed. The dissenter stated:

> To be reasonable, force has to be designed to accomplish a legitimate objective efficiently. The

objective was to make the demonstrators move from where they were seated to the vans. *But the force was not used to move the demonstrators into the vans. It was used to punish them for refusing to get up and walk to the vans. It worked as punishment does, by hurting people enough so that they do something to avoid it.* The nonchakus did not work like pinching the fatty part of the arm, or pulling a person by the finger, or a hammerlock, to move the demonstrators to the van. The nonchakus ... were used as a pain inflicting device.

In this case, a more efficient pain compliance technique would have been for the officers to warn demonstrators that if they did not move voluntarily they would be burned with lighted cigarettes, and then hold the cigarettes against their skin until they complied. The pain would have been comparable, the risk of long term disability less than from tendon injury or fractures in the wrist, and the officers would have been able to keep one hand free. Probably one officer instead of two could have accomplished each arrest. I am quite sure we would not accept the use of lighted cigarettes against the skin as reasonable force in this case. Yet the nonchakus were worse. They inflicted more serious injuries, with longer lasting consequences, without working any better to arrest people rapidly with minimum police effort. The difference may be that nonchakus at least look like dragging devices. But they were not being used to drag, so that distinction does not work.

* * * * * *

... The *Graham* standard of reasonable force bars this use of pain as a law enforcement tool. The intentional infliction of pain was not a reasonable means of achieving a legitimate end. [*Id.* at 813-814, 815 (emphasis added).]

I agree with this reasoning. Like *Forrester*, the devices in this case were not used to directly control the physical actions of a person, but rather, were used to inflict pain to coerce a person into compliance. As such, the use of the Do-Rite sticks must be condemned as unreasonable.

Finally, it should be noted that "where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power." *Jackson v. Bishop*, 404 F.2d 571, 579 (C.A.8, 1968). In this case, Officer LaCross testified that he thought "just about everybody in the [Sault Ste. Marie police] department is qualified and certified" in the use of Do-Rite sticks. The potential for abuse of this device by unscrupulous police officers is obvious, and it would be difficult to establish a departmental policy distinguishing between "permissible" and impermissible levels of pain infliction.

As the Supreme Court remarked in *Rochin, supra* at 173, "to sanction the brutal conduct ... would be to afford brutality the cloak of law." Because the evidence used against defendant to secure his conviction was obtained by unnecessary methods that offend the Due Process Clause, I would reverse.

## APPENDIX D

**The People of the State of Michigan,**

Plaintiff,

v.

**Eric Rural Hanna,**

Defendant.

**Chippewa County Circuit Court**

No. 94-5969-FH
Nicholas J. Lambros, J.
August 7, 1995

Excerpts of Court's Ruling on
Defendant's Motion for New Trial
[Tr. pg. 28]

The do right sticks as cruel and unusual punishment. I suppose in cases where there is a beating that might be the case, but that is not the case here. The testimony was that Mr. Hanna was in the hospital room refusing to take the blood test, that they had an authorized search warrant, and he was putting up resistance and they applied the sticks and demonstrated to the jury how they applied them, and it was in a reasonable fashion, to subdue Mr. Hanna in order for them to obtain the blood. They needed to take a blood sample.

I mean, if that is the case everyone could put up a ruckus and we couldn't do a thing about it. You know, law enforcement

can't do one thing because you are putting up a ruckus. And it is reasonable to obtain the blood. Even the blood draw, which I don't think was necessary, but they did all of that anyway. Certainly, you can't say now when Mr. Hanna raised the issue and they explained the do right sticks and they were shown to have been reasonably applied, that that somehow violates his rights. They were not cruel and unusual. They were used in a reasonable fashion.